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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

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DR. KAREN FITZPATRICK,
PETITIONER,

v.

VILLANOVA UNIVERSITY,
RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dr. Karen Fitzpatrick
P.O. Box 1753
Easton, Maryland 21601
(301) 822-1153

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant in a Sex Discrimination suit is required to produce tangible evidence to the Court in order to substantiate that his articulated reasons for a plaintiff's dismissal are bona fide?

2. Whether Petitioner, after establishing a prima facie case of sex discrimination, produced a preponderance of tangible evidence establishing that the reasons articulated by Respondent for her dismissal are a pretext to disguise sex discrimination; especially since the men in the Education Department were not denied their right to be considered for a permanent appointment, and terminated, for those articulated reasons?

3. Whether the Court's interpretation of the Equal Pay Act is in error, and not in agreement with the interpretation held by the Supreme Court of the United States?

4. Whether the findings of fact in the Equal Pay Act claim are contrary to the tangible evidence produced to the Court, and thus clearly erroneous?

5. Whether the findings of fact in the Sex Discrimination claim and the Equal Pay Act claim, in addition to being clearly erroneous, contain reversible errors of law?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Dr. Karen Fitzpatrick, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Third Circuit entered on 2 November 1984.

### OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the judgment of the district court. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing en banc on 28 November 1984. A copy of the order is attached as Appendix B.

## JURISDICTION

On 2 November 1984, the Court of Appeals denied the petitioner's appeal to reverse the judgement in her sex discrimination suit, which included a claim pursuant to the Equal Pay Act. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291.

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person. . . be deprived of life, liberty, or property, without due process of law. . . .

## STATEMENT OF THE CASE

On 2 November 1984, a panel of the Third Circuit Court of Appeals denied the petitioner's appeal to reverse the judgement in her sex discrimination suit, which included a claim pursuant to the Equal Pay Act. A timely petition for rehearing pursuant to Rule 35 (c) and 40 of the Federal Rules of Appellate Procedure was filed 9 November 1984, and the petition was denied on 28 November 1984, by the Third Circuit.

Dr. Karen Fitzpatrick, petitioner, contends that Villanova University, respondent, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et. seq. by denying her the right to become a permanent member of the Education Department faculty, by denying her the opportunity to be evaluated for tenure, an opportunity which none of the men in the Education Department have ever been denied. The petitioner also contends that the respondent violated the Equal Pay Act, 29 U.S.C. Section 206(d), by paying her a lower starting salary, $1,000 less, than the man in the Education Department she compared herself with, and their jobs are "substantially equal".

## REASONS FOR GRANTING THE WRIT

A defendant in a sex discrimination suit must do more than articulate reasons for a plaintiff's dismissal; the defendant must present evidence to the Court establishing their existence in fact. Then, if a defendant establishes that the reasons for the plaintiff's dismissal are bona fide; the defendant must establish why the reasons for the plaintiff's dismissal were not applied to the men. Flowers v. Crouch-Walker Corp. (7th Cir. 1977).

The District Court states on page 14 of the Memorandum Opinion: (Appendix C)

> Pursuant to the McDonnell Douglas/Burdine standard, this Court determined that the plaintiff had met her burden of establishing, by a preponderance of the evidence, a prima facie case of gender discrimination. The Court finds, however, that Villanova University articulated legitimate, non-discriminatory reasons for not renewing the plaintiff's terminal contract or evaluating her for tenure. The Court further finds that the plaintiff failed to prove by a preponderance of the evidence that any of these reasons was a pretext for gender discrimination.[1]

Villanova does not deny that no man in the Education Department has ever been denied the opportunity to be evaluated for tenure. Therefore, no man in the Education Department has ever been denied the opportunity to become a permanent member of the Education Department faculty which is his right, and also the right of the petitioner, Dr. Karen Fitzpatrick who served on the

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1 Villanova did not have to renew Dr. Fitzpatrick's contract in order to evaluate her for tenure as she was physically present on the faculty in the spring of 1981, the year she was entitled to be evaluated for tenure according to the letter containing the terms of agreement under which she was hired, Exhibit P-6.

faculty from 1976-1981, five years. Since none of the men in the Education Department have ever been denied their right to be considered for tenure, the reasons articulated by Villanova for Dr. Fitzpatrick's dismissal were not applied to the men in the Education Department. In McDonnell Douglas Corp. v. Green, (S. Ct. 1973), this Court established that when the criteria for dismissal are not applied alike to all employees, the proffered justifications, apparently legitimate, are pretexts to disguise improper motivation. In this case the improper motivation is sex discrimination. In Internation Brotherhood of Teamsters v. United States, (1977), (quoting Franks v. Bowman Transportation Co., (1976)), this Court established that proof of discriminatory motive may be inferred from differences in treatment of males and females. Miss Laurice Albed, dismissed from the Education Department in June of 1976, and Dr. Fitzpatrick hired in September of 1976, both in teacher education, were denied their right to be evaluated for tenure, which Villanova does not deny. In Corley v. Jackson Police Dept., (5th Cir. 1978), this Court established that even if "good cause" exists for the employer's action, it is still illegal to apply that cause unequally based upon race, sex, religion, or national origin. However, Dr. Fitzpatrick produced to the Court during the trial the following evidence which establishes that the reasons given for her termination by Villanova are a pretext to disguise sex discrimination, especially since those reasons are not applied to the men in the Education Department.

The Court on page 15 of the opinion states Villanova's first reason for Dr. Fitzpatrick's termination without being given her right to be evaluated for tenure:

> Villanova's determination not to seek state approval for the reading certification program which plaintiff had been hired to develop,

Dr. Fitzpatrick produced to the Court the following evidence which establishes that the reason contained in the quote above is not bona fide:

1. Exhibit P-38, the 1983-84 Villanova University Graduate Bulletin, Page 70 of this publication lists the seven courses of the reading certification program just as they were designed by Dr. Fitzpatrick with the assistance of the men in the Education Department.

2. Dr. Nichols, Chairman of the Education Department, testified that the courses are listed, "in anticipation of getting the program". (T. p. 15, Nichols-Direct).

3. A man was hired in the Education Department in the fall of 1982, who replaced Dr. Fitzpatrick teaching graduate reading courses. (Exhibit D-33, T. p. 18, Nichols-Direct).

Dr. Fitzpatrick was not told orally or in writing that her contract at Villanova depended on whether or not Dr. Nichols, Chairman of the Education Department, decided to implement the reading certification program or not. None of the men who assisted Dr. Fitzpatrick were denied their opportunity to be evaluated for tenure for reason number one stated on page 15 of the opinion, and the preceding page of this document. Villanova did not produce any exhibits to the Court to substantiate reason number one for Dr. Fitzpatrick's termination, and the reason was just articulated which the Court in the opinion acknowledges.

The Court on page 15 of the opinion states Villanova's second reason for Dr. Fitzpatrick's termination without being given the opportunity to become a permanent member of the faculty, an opportunity which the men in the Education Department have never been denied:

> the generally declining enrollment in the Education Department, especially the teacher education section,

Dr. Fitzpatrick produced to the Court the following evidence which establishes that the reason contained in the quote above is not bona fide:

1. Exhibit P-39, a page from a memorandum given out at a faculty meeting by Dr. Henry Nichols, dated April 22, 1981, establishes that teacher education declined

much less that the other two sections of the Education Department, administration and counseling.

2. Both Dr. Nichols, Chairman of the Education Department and Dr. Bernard Downey, Dean of the Graduate School, admitted that Dr. Fitzpatrick was terminated without being given her right to be evaluated for tenure, when the enrollment was going up, and the men were given their right to be evaluated for tenure when the enrollment was going down. (T. p. 36, Nichols-Direct, T. p. 29, Downey-Direct).

3. Both Dr. Downey and Dr. Nichols were forced to admit when handed Exhibits P-27, P-28, and P-29, that the Education Department had the highest total student enrollment out of 19 graduate departments in the summer of 1980; the highest total student enrollment out of 21 graduate departments in the fall of 1980; and the highest total student enrollment out of 21 graduate departments in the spring of 1981, Dr. Fitzpatrick's last semester at Villanova.

4. Exhibit P-29, establishes that student enrollment in the Education Department increased 46 students from the fall of 1980 to the spring of 1981, Dr. Fitzpatrick's last semester at Villanova.

5. Dr. Nichols admitted that the numbers in Dr. Fitzpatrick's undergraduate courses are "fairly high". (T. p. 57, Nichols-Direct).

6. Two new faculty members were hired after Dr. Fitzpatrick was notified orally of her dismissal, a woman hired in a temporary position at a salary of $16,000, and a man who replaced Dr. Fitzpatrick teaching graduate reading courses, in a permanent position at a salary of $21,000. New faculty members are not hired if the student enrollment is declining.

Villanova did not produce any tangible evidence to the Court to establish that decline in enrollment as a reason for Dr. Fitzpatrick's dismissal is bona fide.

The evidence produced to the Court by Dr. Fitzpatrick establishes that the men in the Education Department were given the opportunity to be evaluated for tenure when the enrollment was going down, and Dr. Fitzpatrick was denied the opportunity to be evaluated for tenure when enrollment was going up.

The Court on page 15 of the opinion states Villanova's third reason for Dr. Fitzpatrick's termination:

> the prospect that enrollment in the Education Department would continue to decline.

None of the men in the Education Department were dismissed because of the prospect that enrollment would continue to decline and two new faculty members were hired after Dr. Fitzpatrick was notified of her dismissal, Exhibit D-33. The opinion on page 11 cites undergraduate statistics pertaining to the years Dr. Fitzpatrick was no longer a faculty member at Villanova. These statistics are based on the articulated statements of the chairman of the Education Department, and are not supported by any statistics available from the Registrar's Office. In addition, the Court granted Villanova a Protective Order, dated June 30, 1983, which stated:

> ORDERED AND DECREED that defendant is required to produce to plaintiff only the class enrollment statistics requested for the period between September, 1976 and May, 1981.

Therefore, as a result of the Protective Order, Villanova knew that Dr. Fitzpatrick did not have any statistics after the year 1981, and Dr. Nichols could articulate his own statistics, which he did with nothing in writing to back up his statements.

The reasons given by Villanova for Dr. Fitzpatrick's termination were articulated which the district court acknowledged in the opinion. These articulated reasons are based on the articulated statements of Dr. Henry O. Nichols, Chairman of the Education Department, who in

a memorandum to the vice president of academic affairs, recommended that Dr. Fitzpatrick be terminated because of "declining enrollment and the uncertainty of the status of the reading program". (Exhibit P-37) Dr. Nichols wrote this memorandum shortly after Dr. Fitzpatrick had turned over the completed graduate reading certification program to him.

The three reasons stated by the Court on page 15 of the opinion were based on the articulated statements of Dr. Henry O. Nichols, Chairman of the Education Department. The following cites just a few of the contradictions revealed by the transcript in his testimony:

1. Dr. Nichols testifies that Villanova does not have a reading program. (T. p. 15, Nichols-Direct). Exhibit P-52, a letter of recommendation for Dr. Fitzpatrick, written by Dr. Nichols before she began legal proceedings against Villanova states: (T. p. 101, Nichols-Direct)

> She did an outstanding job of researching and developing an entire graduate reading program in the past two years.

2. Dr. Fitzpatrick asks Dr. Nichols if he recommended that any of the men not be issued another faculty contract because of the extreme decline in enrollment which he states exists. Dr. Nichols answers, "No, I did not". The Court then asks Dr. Nichols to explain why he didn't? Dr. Nichols tells the Court that the steepest decline in the Education Department was in the area of teacher education. (T. p. 19, Nichols-Direct). Dr. Fitzpatrick hands Dr. Nichols, Exhibit P-39, a memorandum of April 22, 1981, which Dr. Nichols gave out at a faculty meeting. That memorandum shows that graduate teacher education had the lowest percentage of decline in enrollment, when compared to the other two sections of the Education Department, administration and counseling. Dr. Nichols' statement that teacher education had the steepest decline in enrollment is false.

3. Dr. Fitzpatrick asks Dr. Nichols about the reason for her dismissal, and Dr. Nichols answers that the reason for her dismissal was declining enrollments primarily in graduate teaching education and reading. (T. p. 40, Nichols-Direct). As stated on the preceding page, Exhibit P-39, establishes that graduate teacher education had the lowest percentage of decline in enrollment, when compared to the other two sections of the Education Department, administration and counseling. Exhibits P-42, P-46, and P-47, graphs showing student enrollment in reading courses, establish that student enrollment in reading courses went up from 1976-1980, the year Dr. Nichols recommended that Dr. Fitzpatrick be terminated.

4. Dr. Fitzpatrick asks Dr. Nichols to compare statements in his letter of recommendation, Exhibit P-52, for Dr. Fitzpatrick, with statements made by him on her annual faculty evaluation, Exhibit P-53. He wrote positive statements related to Dr. Fitzpatrick's professional competence in the letter of recommendation written before Dr. Fitzpatrick began taking action against Villanova. He wrote negative statements about Dr. Fitzpatrick's professional competence on her annual faculty evaluation after she began taking action against Villanova. (T. pp. 95-102, Nichols-Direct).

5. Dr. Nichols denies being served a subpoena by Dr. Fitzpatrick to appear in Court for the trial. (T. p. 3, Nichols-Direct).

The three reasons for Dr. Fitzpatrick's termination without being given the opportunity to be evaluated for tenure, an opportunity which none of the men in the Education Department have ever been denied are based on the articulated statements of Dr. Henry O. Nichols, Chairman of the Education Department. Villanova was not able to produce to the Court any exhibits to substantiate the articulated statements of Dr. Nichols. As stated on page 2, A defendant in a sex discrimination suit must

do more than articulate reasons for a plaintiff's dismissal. Elowers v. Croach-Walker Corp. (7th Cir. 1977).

Since Villanova was not able to substantiate its articulated reasons for Dr. Fitzpatrick's termination, cited on page 15 of the opinion, Villanova contended that Dr. Fitzpatrick was not in a tenure-track position, and was not entitled to tenure evaluation as the men were. This again is sex discrimination. In Phillips v. Martin Marietta Corp., (1971), the Supreme Court established that it is illegal to permit one hiring policy for women and another for men, and that persons of like qualifications be given employment opportunities irrespective of their sex. Pages 6-9, of the opinion discusses Dr. Fitzpatrick's contract, and the Court states on page 8:

> Even assuming that she held a "tenure-track" position, plaintiff had been notified at the end of her fourth year that her contract would not be renewed at the end of her fifth year, and that her services therefore would terminate at the end of the fifth year. Since the decision not to retain the plaintiff already had been communicated to her, she had no right to an evaluation for tenure.

The above quote taken from the opinion, now gives institutions of higher education a procedure they can use to terminate faculty members without evaluating them for tenure and thus deny them their right to become permanent members of the faculty because of their sex, race, color, religion, or national origin. The procedure is just notify the faculty member one year before evaluation for tenure that instead of being evaluated for tenure, he/she is going to be terminated.

The Court states on page 7 of the opinion:

> Villanova claimed that the plaintiff was in a non-tenure-track position, and placed great emphasis upon the fact that the word "terminal" appeared in the initial letter of offer, in the

> cover letter accompanying plaintiff's second contract, and in all but the first of her five successive faculty contracts. Apparently, contracts for tenure-track positions do not contain the word "terminal".

The letter of offer which the Court referred to in the quote on the preceding page, contained the following sentence:

> I am pleased to offer you a one year terminal appointment to the faculty of Villanova University in the Department of Education in the rank of Assistant Professor at the salary of $13,000 for the ten-month period September through June, commencing September 1, 1976.

That same letter of offer, Exhibit P-6, states:

> Thus, in case of renewal, your final evaluation for tenure would take place at the end of your fifth year of service at Villanova University.

The clause, "in case of renewal, was not contained in the letters of offer of the men hired in the Education Department, nor was it contained in the letters of the men hired in the various academic departments of Villanova at the same time the Petitioner was hired in 1976. (Exhibit P-31). In Steele v. Louisville & Nashville R.R. Co., (1944), it was established that the "duty of fair representation" applied to the negotiation of agreements prohibits discriminatory contract clauses. In addition, as stated previously the Supreme Court prohibits one hiring policy for women and another for men. The word "tenure" would not have been in Dr. Fitzpatrick's letter of offer if the position had not been a tenure-track position unless Villanova deliberately intended to deceive the Petitioner.

The following evidence was produced to the Court which establishes that Dr. Fitzpatrick was in a tenure-track position and had just as much right to be evaluated for tenure as the men in the Education Department:

1. Exhibit P-11, a letter of offer to another faculty member in the Education Department. That letter contained the word, "terminal" and the faculty member was given the opportunity to be evaluated for tenure.

2. A letter from the American Association of University Professors in Washington, D.C. dated August 12, 1983, to Dr. Fitzpatrick. The letter was written in response to her question pertaining to the word, "terminal" as it appeared in her letter of offer. The following quote is taken from that letter:

> My reading of the initial letter of appointment is that the word "terminal" carries no special meaning in context . . . . I imagine the word "terminal" was added in order to suggest the annual quality of the contract. It appears, from my reading, to have no bearing on the discrimination issue you are raising.

The American Association of University Professors is the last word in faculty contracts. Counsel for Villanova objected to the letter and the Court sustained the objection. The letter is on page 25 of Reply Brief for Appellant.

3. Exhibit P-21, a memorandum from the Dean of Arts and Science, Father John O'Malley to Dr. Nichols. The memorandum states: "As of this June 1979, Dr. Fitzpatrick has four years of credit toward tenure".

4. The following statement made by Dr. Nichols on cross examination by his attorney: (T. p. 131, Nichols-Cross).

> SHE WAS DEFINITELY THE JUNIOR PERSON ON THE TENURE-TRACK. THERE'S NO QUESTION ABOUT THAT.

5. The following testimony of Dr. James J. Cleary, who wrote the letter of offer, Exhibit P-6:

> a. All contracts at Villanova are terminal as they are for one year only.
>
> (T. p. 52, Cleary-Direct).
>
> b. The contract that is offered, which is presumed to be on both the part of the

administration and part of the faculty member involved a tenure track position is, yes, a one-year contract.

(T. p. 51, Cleary-Direct).

c. Dr. Cleary admits that the possibility of tenure existed for Dr. Fitzpatrick. (T. p. 86, Cleary-Direct).

d. Dr. Cleary tells the Court if a person is on a tenure-track position, it is assumed that the contract will be renewed. (T. p. 62, Cleary-Direct).

6. The following testimony of Dr. Bernard J. Downey, Dean of the Graduate School:

a. Dr. Downey states that a person on a tenure-track position has the right to be considered for tenure. (T. p. 15, Downey-Direct).

Section 7.5 of the Civil Rights Act of 1964, states that benefits may not be afforded in a discriminatory manner. Tenure is a "benefit seniority" and does not depend on the length of service of the other faculty members. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion. Hishon v. King and Spalding, May 22, 1984. Section 7.7 of the Civil Rights Act of 1964, contains the "imposition of fairness" requirement which the Supreme Court relied on in the Hishon v. King and Spalding case. Villanova violated this fairness requirement by attempting to dismiss Dr. Fitzpatrick one year before she was evaluated for tenure. When she returned because of the intervention of the American Association of University Professors, Villanova refused to evaluate her for tenure, thus violating the terms of agreement under which she was hired, Exhibit P-6. This is nothing more than breach of contract. Villanova, the Education Department, has never attempted to dismiss any of the men one year before tenure evaluation and no man in the Education Department has ever been denied the opportunity to be evaluated for tenure as Miss Laurice Albed and Dr. Fitzpatrick, both in teacher education were.

The preceding pages have established that the Findings of Fact based on the articulated statements of Villanova are contrary to the tangible evidence produced to the Court and thus clearly erroneous. Also, the opinion contains additional Findings of Fact which are clearly erroneous, as they are contrary to the evidence produced to the Court during the trial:

1. The following statement on page 10 of the opinion is contrary to the evidence produced during the trial:

> Three persons, all males, were tenured in the teacher education section from 1976-1979; no person has been tenured in that section since 1979.

Exhibit D-33, establishes that six of the twelve men given their right to be evaluated for tenure during the five years Dr. Fitzpatrick served on the faculty, are in teacher education. The only woman ever given the opportunity to be evaluated for tenure in teacher education was hired in 1966, and is now approaching sixty-five, and in failing health. The reason no person has been tenured in teacher education since 1979, is because all the men in teacher education have tenure, and Dr. Fitzpatrick was denied her right to be evaluated for tenure.

The Court on page 10 of the opinion states:

> With regard to the entire Department of Education, three persons, including the plaintiff, were hired as faculty members in 1976; all were female.

Both Dr. Nichols and Dr. Cleary testified that only women applied for the position that Dr. Fitzpatrick was hired for, from which it can be inferred that the number of women applying for Villanova teaching positions outnumbers the men, in Education. (T. p. 109, Nichols-Cross, T. p. 126, Cleary-Cross). Since 1976 three females have been dismissed from the Education Department, two without being evaluated for tenure. Two were dismissed because they did not obtain doctorates, yet, two men teaching in the Education Department did not have doctorates, and Mr. Daniel O'Mara was awarded

tenure in 1982, without obtaining his doctorate, Exhibit P-8. Educational level requirements are permitted only if uniformly required of all employees and shown to have a valid relationship to job requirements. 29 CFR 860.103 (F) (2). In Corley v. Jackson Police Dept., (5th Cir. 1978), it was established that even if "good cause" exists for the employer's action, it is still illegal to apply that cause unequally based upon race, sex, religion, or national origin.

In Cross v. United States Postal Service, (8th Cir. 1981), this Court established that Title VII prohibits discrimination even against a single person, and statistical evidence of nondiscriminatory hiring has relevance in negating an inference of discriminatory motive, but will not control.

> The Court states on page 11 of the Opinion:
> In the Spring of 1980, the plaintiff was the most junior full-time faculty member in the Education Department.

Exhibit D-33, establishes that in the fall of 1980, a woman, Dr. Sherry Sukol, was hired in a temporary position, and in the fall of 1982, a male was hired who replaced Dr. Fitzpatrick teaching graduate reading courses. (T. p. 18, Nichols-Direct). The male was hired in a permanent position.

> The Court states on page 11 of the Opinion:
> With the exception of the counseling section, the Department's graduate enrollment has declined, particularly in the teacher education section, which had only nine graduates in the spring of 1983.

The number nine is taken from the articulated statements of Dr. Nichols and no statistics were produced to the Court to substantiate his testimony. Exhibit P-39 shows that counseling declined much more than teacher education, yet, all the men in counseling, administration, and teacher education were not denied their right to become permanent members of the faculty by being denied the opportunity to be evaluated for tenure.

The Court states on page 11 of the Opinion:

> Sometime after the plaintiff was hired (but prior to February of 1980; the University determined that there was insufficient student and community interest to justify Villanova pursuing state approval for a reading certification program.

None of the men in the Education Department were terminated because of the reading certification program, and Dr. Fitzpatrick produced Exhibit P-37, written by Dr. Nichols to the vice-president of academic affairs dated, January 25, 1980, in which he recommended that Dr. Fitzpatrick be terminated because of the uncertainty of the status of the reading program. Villanova has the entire reading progam in the 1983-84 Graduate Bulletin, and as stated previously Dr. Nichols testified that the courses are listed in "anticipation of getting the program". (T. p. 15, Nichols-Direct).

At the end of the third day of the trial, Dr. Fitzpatrick rested her case. She had presented her entire case, including evidence that the reasons for her termination were a pretext to disguise an underlying discriminatory motive at one time, which is permitted. Flowers v. Crouch-Walker Corp. (7th Cir. 1977). Counsel for Villanova was not able to present a case to the Court. (T. p. 179, 10/17/83). Therefore, the Court gave him approximately seventeen hours to produce evidence that Villanova is complying with affirmative action and evidence that would account for the great disparity in numbers between men and women in the Education Department. At the time of Dr. Fitzpatrick's termination the Education Department consisted of 17 men as compared to 4 women and Dr. Fitzpatrick is one of the women. Also, the entire university faculty was 91% male, exclusive of nursing. Dr. Fitzpatrick was the only woman in undergraduate teacher education compared to eight men. The President of the University was produced at the end of seventeen hours. He had been Dr. Fitzpatrick's first witness. The President testified that he

thinks the University's present policy is that it will give preferential treatment to qualified women and qualified minorities. No documents were produced to the Court to substantiate the President's testimony despite the fact that he testified that job descriptions are placed in "particualr newspapers and magazines and journals that would reach a black and minority group."

Dr. Fitzpatrick in presenting her case had produced to the Court the following evidence which establishes that Villanova is not complying with affirmative action.

1. Exhibit P-18, an article, "V.U. Hiring Process Analyzed," taken from the October 16, 1981, student newspaper, The Villanovan. The article states that the Middle States Association criticized Villanova's record on the hiring of minorities and women. In that same article, Ed Collymore, Villanova's Affirmative Action Officer states:

> I hope that since Villanova is Catholic and Christian, people will do what is right, but I sometimes have doubts about this.

2. Exhibit P-19, an article, "Where Do Women Belong?" taken from The Villanovan, dated Nov. 20, 1981. The article quotes Dr. M. Vosburg, Associate Professor of Sociology at Villanova as saying:

> One area where women lag far behind their male counterparts is in the faculty. There are not enough women faculty members.

3. Exhibit P-8, Tenure Decisions of Villanova University, confirmed that Villanova is not complying with Affirmative Action Law as the number of women evaluated and granted tenure in 1982 is ZERO, as compared to seven men. Counsel for Villanova refused to give Dr. Fitzpatrick the tenure decisions for 1983, despite a written request for the document. If Villanova is complying with Affirmative Action Law, where are the women?

Villanova was not able to produce to the Court any documents pertaining to Villanova University statistics that would account for the great disparity between male and female faculty members especially in the Education

Department, and Education is a field where many women obtain their doctorates. The President testified that more men apply for available positions than women, however, he did not say that more men apply for available positions in the Education Department. He testified that faculty recruitment reports are required of the departmental chairman, however, none of these faculty recruitment reports were produced to the Court. These reports show how many men, women, and minorities apply for available positions in the Education Department and in the other academic departments of Villanova. Villanova was given seventeen hours to comply with the Court's request to produce evidence that Villanova is complying with Affirmative Action Law, and Villanova failed to produce anything in writing to establish that Villanova is complying with the law. Villanova was also given seventeen hours to produce evidence that would explain the great disparity in numbers between men and women in the Education Department, Villanova failed to produce any statistics which would substantiate the President's testimony that more men apply for available positions at Villanova than women. The President's testimony was Villanova's entire case, and he was produced only after the Court requested some evidence from Villanova. Dr. Fitzpatrick was not told what the Court wanted, after she rested her case at the end of the third day after producing four administrators from Villanova, letters, memorandums, statistics, graphs, and other documents which established that the articulated reasons given by Villanova for her dismissal existed only in the articulated statements of the Chairman of the Education Department whose credibility is questionable as the transcript reveals the contradictions in his testimony.

Dr. Fitzpatrick produced the following evidence which establishes that the disparity in numbers between males and females in the Education Department is due to sex discrimination, and that there is a pattern and practice of sex discrimination against women, as they are treated differently from men.

1. Women are hired and then terminated-Laurice Albed, 1976, Cynthia Phillips, 1976, Dr. Karen Fitzpatrick, 1981, and Dr. Nichols admitted that Dr. Sherry Sukol is in a temporary position. When the criteria for dismissal are not applied alike to all employees, the proffered justifications, apparently legitimate, are a pretext to disguise improper motivation. McDonnell Douglas Corp. v. Green, (S. Ct. 1973). Women are terminated for reasons that are not applied to the men, and are denied their right to become permanent members of the faculty, by being denied the opportunity to be evaluated for tenure. No man in the Education Department has ever been denied the right to be evaluated for tenure.

With the exception of the second paragraph on page 14 of the opinion, the Court devoted the entire opinion to the articulated statements of Villanova. No mention is made of the preponderance of exhibits that Dr. Fitzpatrick produced to the Court which establish that the reasons given by Villanova for her dismissal do not exist. (However, the Court did acknowledge that Dr. Fitzpatrick established a prima facie case of sex discrimination.) A reader of the opinion is presented with the position of Villanova, but not that of Dr. Fitzpatrick. Therefore, the opinion demonstrates a bias. If this had been a murder, Villanova would have been found not guilty because its administrators articulated that they didn't do it. Sex discrimination is serious, and Dr. Fitzpatrick's career in higher education has been destroyed. No other institution is going to hire a professor who has been employed for six years in higher education, and then is dismissed without being evaluated for tenure, which is illegal.

The preceding pages establish that the findings of fact in this Title VII action, based on the articulated statements of Villanova, are contrary to the tangible evidence produced to the Court during the trial, and thus clearly erroneous. The preceding pages also establish the reversible errors of law especially the following:

1. A defendant in a sex discrimination suit must do more than articulate reasons for a plaintiff's dismissal; the defendant must present evidence to the Court establishing their existence in fact. Then if a defendant establishes that the reasons for the plaintiff's dismissal are bona fide; the defendant must establish why the reasons for the plaintiff's dismissal were not applied to the men. Flowers v. Crouch-Walker Corp. (7th Cir. 1977).

Villanova was not able to meet the two requirements established by the Court. The reasons for the plaintiff's dismissal were not applied to the men as no man in the Education Department has ever been dismissed without being given his right to be considered for a permanent appointment in the Education Department, by being denied the opportunity to be evaluated for tenure.

2. When the criteria for dismissal are not applied alike to all employees, the proffered justifications, apparently legitimate, are a pretext to disguise improper motivation. McDonnell Douglas Corp. v. Green, (S. Ct. 1973).

The proffered justifications in this case were not legitimate, as Dr. Fitzpatrick established by a preponderance of the evidence that the criteria for her dismissal existed only in the articulated statements of the Chairman of the Education Department, Dr. Henry Nichols. As stated in number one above, the criteria for dismissal were not applied to the men in the Education Department.

3. Proof of discriminatory motive may be inferred from differences in treatment of males and females. International Brotherhood of Teamsters v. United States, (1977), (quoting Franks v. Bowman Transportation Co., (1976).

4. Even if "good cause" exists for the employer's action, it is still illegal to apply that cause unequally based upon race, sex, religion, or national origin.(However, Dr. Fitzpatrick produced a preponderance of exhibits

showing that the reasons for her dismissal were not bona fide). Corley v. Jackson Police Dept., (5th Cir. 1978).

5. The Supreme Court has established that it is illegal to permit one hiring policy for women and another for men. Persons of like qualifications are to be given equal employment opportunities irrespective of their sex. Phillips v. Martin Marietta Corp., (1971).

Dismissing Dr. Fitzpatrick without giving her the opportunity to become a permanent member of the faculty, by denying her the opportunity to be evaluated for tenure is a violation of number five above, as none of the men in the Education Department were denied the opportunity to be considered for tenure as she was.

6. Section 7.5 of the Civil Rights Act of 1964, states that benefits may not be afforded in a discriminatory manner. Tenure is a "benefit seniority" and does not depend on the length of service of the other faculty members. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion. Hishon v. King and Spalding, May 22, 1984.

Three women have been dismissed from the Education Department since 1976, and two of them were denied their right to be evaluated for tenure. This is sex discrimination.

7. Section 7.7 of the Civil Rights Act of 1964, contains the "imposition of fairness" requirement which the Supreme Court relied on in the Hishon v. King and Spalding case. Villanova violated this fairness requirement by attempting to dismiss Dr. Fitzpatrick one year before she was to be evaluated for tenure. When she returned because of the intervention of the American Association of University Professors in Washington D.C., Villanova refused to evaluate her for tenure, thus violating the terms of agreement under which she was hired. This is breach of contract. (Exhibit P-6).

## THE EQUAL PAY ACT

The Court's interpretation of the Equal Pay Act is in error as it is not the interpretation held by the Supreme Court of the United States which is as follows:

In a case involving the Equal Pay Act, the plaintiff does not have to show that her pay is less than the average pay for males or that she is the victim of a pattern of discrimination encompassing other victims as well. She need only show the existence of one male earning a greater salary than she, as long as she establishes that she and the male are performing "substantially equal" work. The work is "substantially equal" where the performance requires equal skill, effort and responsibility and is performed under similar working conditions. Shultz v. Wheaton Glass Co., (3rd Cir. 1970).

Pages 15, 16, 17, of the opinion of the District Court establishes that the Court's interpretation of the Equal Pay Act is in error. Dr. Fitzpatrick had to compare herself with one male employee and then establish that her position and the position of the male employee are "substantially equal", which she did as the following reveal:

1. Exhibits P-5, and P-6, establish that Dr. Nicholas Rosa, assistant professor of education, was paid a starting salary $1,000 more than Dr. Karen Fitzpatrick, assistant professor of education, and their jobs are "substantially equal".

2. Dr. Fitzpatrick established that their jobs are "substantially equal". The President of Villanova admitted that faculty members at Villanova are evaluated on the same criteria on their annual faculty evaluations. (T. p. 32, Driscoll-Direct). Dr. Downey, Dean of the graduate school, agreed that positions on the faculty are identical, and he also agreed that the following criteria are used in evaluating faculty members at Villanova: teaching, counseling, research and publication, service to the community, and service to the University. (T. pp. 24-25, Downey-Direct). The Court in the opinion did not

state the skills that faculty members at Villanova perform.

Even though Dr. Fitzpatrick did not have to show that other women in the Education Department were paid a lower starting salary than their male counterparts, she did because paying women a lower salary than men in the Education Department is standard procedure. Exhibits P-1 and P-2, are letters of offer to a male and female hired in the Education Department in 1970 at the same rank. The female was paid a starting salary $1,500, lower than her male counterpart. Exhibits P-3 and P-4, are also letters of offer of a male and female hired in the Education Department. The female was paid $2,100, less than the male. Both women have been dismissed from the Education Department, and both men have been awarded tenure.

> The Court states the following on page 17 of the opinion:
>
> > Moreover, this Court finds on the basis of the evidence presented that any differences in the salaries paid to both male and female assistant professors at Villanova are based upon such factors as educational background and credentials, professional experience, and the relative market for qualified individuals in various academic areas.

No evidence, other than articulated statements, was produced to substantiate the above quote. Both Dr. Nicholas Rosa and Dr. Fitzpatrick are in Education. If Dr. Rosa had been more qualified, he would have been hired at a higher rank. The President of Villanova admitted that Dr. Fitzpatrick had taught at the elementary and secondary levels, and had served on the faculty at Winona State University. He also admitted that Dr. Rosa "may not have served on a university faculty anywhere else other than Villanova". (T. p. 34, Driscoll-Direct).

In making the evaluation of substantial equality, job titles, job classifications, and job descriptions are not controlling. The Courts look to the duties actually being

performed. 29 CFR 800.121. In this case the duties being performed are teaching, counseling, research and publication, service to the community, and service to the University. The duties of Dr. Nicholas Rosa and Dr. Karen Fitzpatrick are "substantially equal". Villanova did not produce anything in writing to show that the two positions are not "substantially equal".

Page 17 of the opinion reads:

> Furthermore, plaintiff presented no evidence showing that any difference in salaries paid to male and female assistant professors were based upon gender.

Equality of work is an objective fact. The plaintiff does not have to present evidence of improper motivation. Hodgson v. Brookhaven General Hospital, (5th Cir. 1972).

The Courts have agreed that female availability, prevailing wages, and other factors which reflect a willingness of females to work at a lower rate are not "factors other than sex". To permit this economic reality to justify disparate pay would be to undercut completely the remedial purpose of the Equal Pay Act. Hodgson v. Brookhaven General Hospital. (5th Cir. 1972).

The February 8, 1984, Chronicle of Higher Education, p. 21, published the average faculty salaries by rank and sex of colleges and universities throughout the United States. The figures were collected by the National Center for Education Statistics. The salary for a male assistant professor at Villanova is 24.6. The salary for a female assistant professor at Villanova is 22.4. The salaries of women in the other academic ranks at Villanova are also less than the men in the same academic rank. The Chronicle is contained in the Falvey Library on the Villanova campus.

Dr. Fitzpatrick also established by using Exhibits P-6, P-34A, and P-34B, that there was discrimination between her fringe benefits, medical and retirement, and the fringe benefits of the two men in the Education Department hired one year before she was. Dr. Fitzpatrick's

medical and retirement benefits did not begin until several years after she was hired, while the retirement benefits of the men hired in 1975 became effective immediately. In Peters v. Missouri Pacific R.R. Co., (5th Cir. 1973); and Rosen v. Public Service Electric & Gas Co., (3rd Cir. 1973), the Court established that distinctions in retirement ages or fringe benefits, including the benefits claimed upon retirement, are forms of discrimination in compensation.

Page 16 of the opinion states the starting salaries of various faculty members hired in various academic departments. Villanova did not match any letter with a male or female counterpart. The female in the Department of Education paid $18,000.00 was hired at the associate professor rank and her letter of offer was not matched with a male associate professor. ($18,000.00 is low for an associate professor). The letters of offer Villanova used are Exhibit P-31, on Dr. Fitzpatrick's list of exhibits. Villanova in its Brief for Appellee, page 32, states, "If Dr. Fitzpatrick received less pay than any male for substantially equal work, . . . This clause establishes that faculty members in the Education Department perform substantially equal work.

The Court adopted the interpretation of the Equal Pay Act given to it by Villanova which is incorrect. Dr. Fitzpatrick established that she was paid a starting salary $1,000.00 less than Dr. Nicholas Rosa, and their jobs are "substantially equal". This is what the Equal Pay Act requires.

The findings of Fact in the Equal Pay Act Claim are contrary to the tangible evidence produced to the Court during the trial, and thus, clearly erroneous. The Findings of Fact contained reversible errors of law, and the Court's interpretation of the Equal Pay Act is in error, as its interpretation is not the interpretation held by the Supreme Court of the United States.

## CONCLUSION

For the foregoing reasons, petitioner Dr. Karen Fitzpatrick respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Dr. Karen Fitzpatrick, pro se

Dr. Karen fitzpatrick, pro se
P.O. Box 1753
Easton, Md. 21601

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1190

FITZPATRICK, KAREN
v.
VILLANOVA UNIVERSITY

Dr. Karen Fitzpatrick,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 81-4428)
District Judge: Honorable Raymond J. Broderick

Submitted October 16, 1984

Before: WEIS, HIGGINBOTHAM and ROSENN,
Circuit Judges.

Filed Nov. 2, 1984

MEMORANDUM OPINION OF THE COURT

APPENDIX A-1

WEIS, Circuit Judge.

Plaintiff, a former member of the faculty of Villanova University, brought this suit under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. The case was tried to the court which entered judgment in favor of the defendant.

The case was decided essentially on factual issues, and the appeal attacks those factual findings. Our scope of review is narrow. We may not try the case de novo but must accept the findings of fact by the district court unless they are clearly erroneous. See Fed. R. Civ. P. 52.

We have carefully reviewed the plaintiff's contention but have not been persuaded that the findings of fact are clearly erroneous. Nor do we find any reversible errors of law. The case was carefully tried and the district court noted that although plaintiff was a well qualified individual, she had not demonstrated a violation of the applicable statutes.

Accordingly, the judgment of the district court will be affirmed.

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TO THE CLERK:

Please file the foregoing opinion.

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Circuit Judge

APPENDIX A-2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1190

DR. KAREN FITZPATRICK,

Appellant

v.

VILLANOVA UNIVERSITY,

Appellee.

(D.C. Civil No. 81-4428)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Seitz did not participate in the consideration of this matter.

BY THE COURT,

_____

Circuit Judge

DATED: Nov. 28, 1984

APPENDIX B

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

KAREN FITZPATRICK — CIVIL ACTION
v. — FILED Nov. 23, 1983
VILLANOVA UNIVERSITY — NO. 81-4428

MEMORANDUM

BRODERICK, J. — November 17, 1983.

Pro se plaintiff Dr. Karen Fitzpatrick, an assistant professor in the Education Department of Villanova University ("Villanova") from September of 1976 until June of 1981, brought this action charging the defendant Villanova with gender discrimination in its failure to renew her contract and evaluate her for a tenured faculty position. Plaintiff contends that defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. Plaintiff also seeks relief pursuant to the Equal Pay Act, 29 U.S.C. § 206(d). Trial was held before this Court, sitting without a jury, on October 13, 14, 17, and 18, 1983. For the reasons hereinafter set forth, the Court will enter judgment in favor of the defendant and against the plaintiff.

The parties entered into the following stipulations of fact:

> The plaintiff, Dr. Karen Fitzpatrick, began her employment at Villanova University on September 1, 1976. In a letter dated July 16, 1976, the defendant, Villanova University, offered her a one-year terminal appointment to the faculty of Villanova University in the

APPENDIX C

Department of Education in the rank of Assistant Professor at the salary of $13,000.00 for the ten month period, September through June. The letter of July 16, 1976 also stated:

If the appointment should be renewed, your year's full-time service at Villanova University and one year's previous service at Winona State University will be applicable to the standard probationary period of seven years. Thus, in case of renewal, your final evaluation for tenure would take place at the end of your fifth year of service at Villanova University. Your continuous appointment throughout the probationary period, should that take place, will be contingent upon satisfactory service and staffing needs.

On February 12, 1980, the Vice President for Academic Affairs, Dr. James J. Cleary, informed the plaintiff orally in his office that her contract would not be renewed the following year. The plaintiff contacted the American Association of University Professors in Washington, D.C. by letter, and informed the Association of the short notice she had been given regarding her dismissal. The Villanova University Faculty Handbook, page 38, states: "The University commits itself to give notice of non-reappointment in writing in accordance with the following standards: . . . c. At least twelve months before the expiration of an appointment after two or more years in the institution." A representative of the American Association of University Professors, Lesley Lee Francis, Ph.D., Associate Secretary, contacted the President of Villanova University, Rev. John M. Driscoll, O.S.A. by telephone.

In October of 1981, the plaintiff filed her

complaint in this Court after receiving a right-to-sue letter from the EEOC. Her requests for a jury trial and that she be permitted to amend her complaint to include a claim for conspiracy pursuant to 42 U.S.C. § 1985 were denied by this Court by order of July 28, 1982. By order of December 20, 1982, the plaintiff was permitted to amend her complaint to include a claim under the Equal Pay Act.

Based on the evidence produced at trial, the Court makes the following findings of fact. Plaintiff, a woman who received her Ph.D. degree in 1975, responded in 1976 to a notice in The Chronicle of Higher Education which advertised an opening for an Assistant Professor position in the Education Department of Villanova University. According to the notice, the responsibilities of the position included teaching graduate courses in elementary education and reading, teaching undergraduate courses, supervising student teachers, and developing programs in reading or special education. Following her application for this position, plaintiff was interviewed by Dr. James Cleary, then the Vice-President for Academic Affairs, and Dr. Henry Nichols, Chairman of the Education Department. During those interviews plaintiff was told that the primary responsibility of the person hired for the position would be the development of a reading certification program, which the University hoped would attract students to the Education Department. The other principal duties of the position would be the teaching of graduate and undergraduate courses in reading education. Plaintiff was told that the position was a one year terminal appointment, which appointment might be renewed depending upon the status and development of the reading certifitcation program.

Subsequently, the plaintiff was offered the position by Villanova in a letter dated July 16, 1976, a portion of which is quoted above. Plaintiff accepted the offer of

employment in a letter dated July 21, 1976, in which she stated, "I accept your offer of a one year terminal appointment . . . for the ten month period, September through June, commencing September 1, 1976." In August of 1976 plaintiff signed a faculty employment contract with Villanova, which stated that the University would employ the plaintiff for the ten month period beginning September 1, 1976, and ending June 30, 1977, at a salary of $13,000.00.

In a letter dated May 16, 1977, Villanova sent the plaintiff a second contract accompanied by a letter which stated in relevant part:

> Enclosed is a contract we are offering you for the academic year 1977-78 which includes an increment. Please notice that again we are offering you a one year terminal appointment. If you find the terms satisfactory and are willing to accept this terminal contract, please sign the contract by June 1.

On May 23, 1977, the plaintiff signed her second faculty employment contract with Villanova, which stated that the University would employ the plaintiff on a full-time basis for the ten month period from September 1, 1977 to June 30, 1978. Under the dates indicating the period of employment the words "ONE YEAR TERMINAL APPOINTMENT" were typed in capital letters. (The plaintiff's first contract with Villanova did not contain these typed words).

The plaintiff thereafter executed three subsequent faculty employment contracts with Villanova, which provided for the following periods of employment, respectively: September 1, 1978 to June 30, 1979; September 1, 1979 to June 30, 1980; and September 1, 1980 to June 30, 1981. All three of these contracts contained the word "TERMINAL" typed in capital letters under the dates indicating the period of employment.

Plaintiff was orally notified by Dr. Cleary on February 12, 1980 that her contract would not be renewed the following year. The plaintiff complained to the American Association of University Professors (A.A.U.P.) that she had not received the requisite twelve month notice of non-renewal. After the A.A.U.P. contacted the Rev. John Driscoll, O.S.A., President of the University, she was notified in writing on May 2, 1980 that she would be issued a contract for 1980-81. It was stated, however, that this contract for 1980-81 (which in fact was the last of the ten-month contracts described above) was to be the final contract issued to the plaintiff, and that the plaintiff's services therefore would terminate as of June 30, 1981. Plaintiff requested that she be evaluated for tenure in the Spring of 1981, and she was told that an evaluation would not be forthcoming because she was not being rehired by Villanova following the conclusion of the 1980-81 academic year. Plaintiff was not issued any further contracts by Villanova, and was never evaluated for tenure.

Although the pro se plaintiff did not include a breach of contract claim in her complaint in addition to Title VII and Equal Pay Act violations, she contended in her testimony at trial that her contract with Villanova prevented the University from terminating her without affording her an opportunity to be evaluated for tenure. Pursuant to the liberal guidelines established for pro se litigants in Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), the Court will proceed to consider plaintiff's contract claim. The basis for her contention is that portion of Villanova's letter of July 16, 1976, which states:

> If the appointment should be renewed, your year's full-time service at Villanova University and one year's previous service at Winona State University will be applicable to the standard

> probationary period of seven years. Thus, in case of renewal, your final evaluation for tenure would take place at the end of your fifth year of service at Villanova University. Your continuous appointment throughout the probationary period, should that take place, will be contingent upon satisfactory service and staffing needs.

A great deal of evidence was received concerning the terms of the plaintiff's employment contract in particular, as well as the faculty hiring practices at Villanova and in the academic community in general. Much testimony was given regarding the significance and characteristics of a "tenure-track" position, which plaintiff claimed she held, as opposed to a "non-tenure track" position, which Villanova claimed she held. Although both tenure-track and non-tenure-track contracts are generally one year contracts, there appears to be an understanding that persons in a tenure track position ordinarily will be issued successive one-year contracts throughout the probationary period. The normal probationary period for all faculty ranks is seven years, so that tenure, if granted, is effective upon the beginning of the eighth year. Academic service at other institutions may be applied to the probationary period, as was done in the plaintiff's case. Before a faculty member is granted tenure, his or her record is evaluated before the probationary period has been completed. Decisions regarding the granting of tenure and withholding of tenure are generally reported at least one year prior to the expiration of the seven year probationary period. Villanova claimed that the plaintiff was in a non-tenure-track position, and placed great emphasis upon the fact that the word "terminal" appeared in the initial letter of offer, in the cover letter accompanying plaintiff's second contract, and in all but the first of her five successive faculty contracts.

Apparently, contracts for tenure-track positions do not contain the word "terminal".

As noted above, the plaintiff claims she had a tenure-track position, and relies upon the sentence in Villanova's letter of offer which states:

> Thus, in case of renewal, your final evaluation for tenure would take place at the end of your fifth year of service at Villanova University.

The plaintiff held one year terminal appointments for the academic years 1976-77, 1977-78, 1978-79, 1979-80, and 1980-81. Thus, according to her reading of Villanova's letter of offer, she should have been evaluated for tenure at the end of 1980-81, which was her fifth year at Villanova.

It is understandable that a person not versed in the nomenclature of university faculty contracts might believe that he or she held a "tenure-track" position if the terms of their appointment included language similar to that in Villanova's letter of offer to the plaintiff.[1] However, the Court finds that the terms of the plaintiff's contract were not breached by Villanova regardless of whether her position was a "tenure-track" or a "non-tenure-track" appointment. In all of plaintiff's contracts with Villanova, Villanova retained the right to terminate the plaintiff and to refuse to issue her a new contract. Furthermore, Villanova's July 16, 1976 letter of offer clearly states:

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1 Although it was testified that no other faculty member ever complained that he or she had been confused, mistaken, or misled as to whether they had a "tenure-track" or "non-tenure-track" position, it may be advisable nevertheless to specifically state in the letter of offer (and the contract) whether the position is a "tenure-track" position or a "non-tenure-track" position. Neither terms appear anywhere in the Villanova University Faculty Handbook.

> [Plaintiff's] continuous appointment throughout the probationary period, should that take place, will be contingent upon satisfactory service and staffing needs.

The possibility of continued appointment was made contingent and uncertain. The letter of offer specifically stated that "in case of renewal", plaintiff's tenure evaluation would take place at the end of her fifth year at Villanova. Even assuming that she held a "tenure-track" position, plaintiff had been notified at the end of her fourth year that her contract would not be renewed at the end of her fifth year, and that her services therefore would terminate at the end of the fifth year. Since the decision not to retain the plaintiff already had been communicated to her, she had no right to an evaluation for tenure.

The Court finds that the plaintiff did not have any contractual entitlement to reappointment or to a tenure evaluation.

Having disposed of this threshold issue, the Court will now proceed to examine the evidence relevant to plaintiff's Title VII and Equal Pay Act claims.

The evidence presented at trial revealed that Villanova University was an all-male school, with the exception of the College of Nursing, until the late 1960s when the school became co-educational. During the time that Villanova was an all-male school, and continuing through the early 1970s, the pool of applicants for University teaching positions, as well as the University faculty itself, was predominantly male. In approximately 1970 it became University policy to require a doctoral degree as a condition to awarding tenure in most departments of the University, including the Department of Education. Although more females began obtaining doctoral degrees during the 1970s, the number of females

with such degrees in general and in education in particular continued to be significantly less than the number of males possessing such degrees. Beginning in the early 1970s and continuing to the present, Villanova has had an affirmative action program and a social action office which were established to implement Villanova's policy of hiring qualified female and minority applicants.

During 1980-81, the plaintiff's last year at Villanova, the entire University faculty consisted of 355 men and 80 women; 45 of these women were faculty in the College of Nursing. During the same year the University's office of administration was comprised of 30 men and 5 women. From 1975 until 1982, 67 men and 27 women have been granted tenure at Villanova. In 1980-81, the University's Department of Education consisted of 17 men and 4 women, including the plaintiff.

The Education Department at Villanova consists of three sections: administrative, counseling, and teacher education. Plaintiff was hired in the teacher education section of the Department. No person has been hired in the teacher education section since 1976. Three persons, all males, were tenured in the teacher education section from 1976 to 1979; no person has been tenured in that section since 1979.

With regard to the entire Department of Education, three persons, including the plaintiff, were hired as faculty members in 1976; all were female. In the fall of 1980, Dr. Sherry Sukol, a female, was hired in the counseling section of the Department as a temporary replacement for a tenured female faculty member who is currently on a leave of absence. With the exception of Dr. Sukol, no new full-time faculty members were hired in the Education Department during the period 1977 to 1982. In 1982, Dr. Ernest Ramirez, a male, was hired in the administration section of the Department. From 1977 through 1982,

two full-time male faculty members in the Education Department were denied tenure and their employment terminated. Another male professor in the administration section of the Education Department retired in 1982. The other two females who were hired for faculty positions along with the plaintiff in 1976 were granted tenure (in the counseling section of the Department) in 1978 and 1981, respectively. No faculty members in the Education Department have been granted tenure since plaintiff ceased to be employed by the University in June, 1981. Presently, there are five fewer faculty members in the Department than in 1976, when the plaintiff was hired. In the spring of 1980, the plaintiff was the most junior full-time faculty member in the Education Department.

The enrollment in the Education Department of the University's graduate and undergraduate schools generally declined in the period 1978-1983. The number of freshman undergraduate majors in the Education Department in 1983-84 is four. In 1982-83 and 1981-82 there were nine such majors each year, and in 1980-81 there were 13. In the early to mid-1970's, approximately 60 education majors were being graduated yearly. With the exception of the counseling section, the Department's graduate enrollment has declined, particularly in the teacher education sections, which had only nine graduates in the spring of 1983.

Sometime after the plaintiff was hired (but prior to February of 1980), the University determined that there was insufficient student and community interest to justify Villanova pursuing state approval for a reading certification program. The plaintiff had been hired to develop a proposed reading certification program, and did work on the development of such a program while employed at Villanova. The University never sought nor did it receive the state approval necessary to implement

the reading certification program. Furthermore, the evidence showed that Villanova does not presently intend to seek such state approval in the foreseeable future. Although the plaintiff worked on the development of seven reading courses as a part of her preparation of a reading certification program, following her departure in the spring of 1981 only one of the seven courses have been offered by Villanova.

The decision not to re-employ the plaintiff was made by Dr. Cleary, the Vice-President for Academic Affairs, in consultation with Dr. Nichols, the Chairman of the Education Department. On the basis of the evidence presented at trial, the Court finds Villanova's decision not to renew the plaintiff's terminal contract was based upon (1) Villanova's determination not to seek state approval for the reading certification program which plaintiff had been hired to develop, (2) the generally declining enrollment in the Education Department, especially the teacher education section, and (3) the prospect that enrollment in the Education Department would continue to decline. The preparation of a reading certification program was the primary reason for the plaintiff's initial employment at Villanova. The Court further finds that the plaintiff's gender was not a factor in Villanova University's decision not to renew the plaintiff's terminal contract or evaluate her for tenure.

In order to prevail in a suit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq., the plaintiff in this case had to first establish a prima facie case of discrimination. If the plaintiff produces evidence sufficient to establish a prima facie case, the defendant must "articulate some legitimate, nondiscriminatory reason" for its decision(s) adverse to the plaintiff.

Once the defendant proceeds with its burden of production to rebut plaintiff's prima facie case, the plaintiff, who has the burden to convice the trier of fact, by a preponderance of the evidence, may then rebut the defendants' proffered reason for its decision by showing that it was merely pretext for discrimination or retaliation. McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973). Though McDonnell Douglas set forth this three-part procedure of shifting production burdens in a Title VII race discrimination case, the McDonnell Douglas approach is equally applicable to a gender discrimination case. See Kunda v. Muhlenberg College, 621 F.2d 532, 541 (3rd Cir. 1980); Bryant v. International Schools Services, Inc., 675 F.2d 562, 571 (3rd Cir. 1982).

Although discrimination cases can be usefully analyzed in terms of the three-phase framework set forth in McDonnell Douglas v. Green, supra, "there is no requirement that the evidence be introduced in such a compartmentalized form." Worthy v. United States Steel Corporation, 616 F.2d 698, 701 (3rd Cir. 1980). Plaintiff's evidence relevant to the question of pretext can be presented as part of the initial evidence going to the prima facie case itself or it may be developed during the other party's case in chief, such as by cross-examination. Id. at 701; Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (3rd Cir. 1979). The plaintiff, however, always has the burden of persuasion. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 1094-95 (1981).

Pursuant to the McDonnell Douglas/Burdine standard, this Court determined that the plaintiff had met her burden of establishing, by a preponderance of the evidence, a prima facie case of gender discrimination. The Court finds, however, that Villanova University articulated legitimate, non-discriminatory reasons for not renewing the plaintiff's terminal contract or evaluating her for tenure. The Court further finds that the plaintiff failed to prove by a preponderance of the evidence that any of these reasons was a pretext for gender discrimination.

This case differs from most Title VII tenure cases, see, e.g., Kunda v. Muhlenberg College, supra, and Cap v. Lehigh University, 433 F. Supp. 1275 (E.D. Pa. 1977), in that this plaintiff never received a tenure evaluation or a "denial" of tenure. Thus the detailed comparisons usually presented in such cases between a plaintiff rejected for tenure and a person granted tenure (which comparisons are generally made possible through evidence generated by the formal tenure evaluation process), were not applicable. However, plaintiff did establish that she possessed the doctorate degree ordinarily required by Villanova before tenure can be granted. She also established that during the period of her employment three persons, all males, were tenured in the teacher education section of her department, and that since she left Villanova only one person, a male, has been hired by Villanova in the Education Department. She also introduced statistics establishing significant disparities between males and females on the Education Department faculty, on the entire University faculty, and in the University administration. Although she did not produce

evidence concerning the gender composition of the relevant labor markets, see Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736 (1977), the Court found that this pro se plaintiff did establish sufficient statistical disparities to constitute a prima facie case of gender discrimination. See Hazelwood School District v. United States, 433 U.S. at 307-308, 97 S.Ct. at 2741. However, as heretofore stated, the Court finds that the decision not to renew the plaintiff's terminal contract or evaluate her for tenure was based upon (1) Villanova's determination not to seek state approval for the reading certification program which plaintiff had been hired to develop, (2) the generally declining enrollment in the Education Department, especially the teacher education section, and (3) the prospect that enrollment in the Education Department would continue to decline. The Court also finds that Villanova's reasons for not renewing plaintiff's terminal contract or evaluating her for tenure were legitimate and non-discriminatory. Plaintiff failed to carry her burden of convincing this Court by a preponderance of the evidence that her terminal contract was not renewed and that she was not evaluated for tenure because of her gender.

Plaintiff also made a claim pursuant to the Equal Pay Act in this litigation. Under the Equal Pay Act, 29 U.S.C. §206(d), the plaintiff must show that her job required substantially equal skill, effort and responsibility in comparison to jobs performed by higher paid male employees. The burden then shifts to the defendant to prove that the wage differential is justified under one or more of this section's four exceptions: a seniority system, a system measuring earning by quantity or quality of production, or a differential based on any factor other than

gender. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Angelo v. Bacharach Instrument Co., 555 F.2d 1164 (3rd Cir. 1977).

Evidence was presented as to the starting salaries of thirteen faculty members who were hired by Villanova as assistant professors the same year in which plaintiff was hired. The salaries of these thirteen faculty members ranged from a low of $11,500.00 paid to a male in the Department of Speech Communications to a high of $18,000.00 paid to a female in the Department of Education. Three assistant professors, two males and one female, were paid $13,000.00, the same salary as was paid the plaintiff. The only person hired in the Education Department in 1976 in addition to the plaintiff were two females who were paid $15,000.00 and $18,000.00, respectively. The remaining seven of the thirteen faculty members hired in 1976 taught in departments other than the Department of Education, and received salaries ranging from $12,200.00 to $17,200.00.

The defendant contends that the Equal Pay Act is not applicable to a religiously-affiliated school such as Villanova. It appears that two federal courts have reported decisions considering this issue, and they each reached a different conclusion. Compare Ritter v. Mount St. Mary's College, 495 F. Supp. 724 (D.Md. 1980) with Russell v. Belmont College, et al., 554 F. Supp. 667 (M.D. Tenn. 1982). However, this Court need not determine this issue because it finds that even if the Equal Pay Act were applicable to Villanova, the plaintiff has failed to establish by a preponderance of the evidence that her position required substantially equal skill, effort, and responsibility to positions held by higher paid male assistant professors. The plaintiff based her claim of an Equal

Pay Act violation on the ground that all assistant professor positions require substantially equal skill, effort, and responsibility for the purpose to the Equal Pay Act. Her sole basis for this contention appeared to be the fact that the form used by Villanova University in its annual evaluation of faculty members was a standard form which asked the same questions regarding the performance of each individual faculty member. However, the plaintiff produced no evidence showing that the skills required for her position were substantially equal to the skills required for the positions held by any higher paid male assistant professors. Furthermore, plaintiff presented no evidence showing that any differences in salaries paid to male and female assistant professors were based upon gender. Moreover, this Court finds on the basis of the evidence presented that any differences in the salaries paid to both male and female assistant professors at Villanova are based upon such factors as educational background and credentials, professional experience, and the relative market for qualified individuals in various academic areas.

The Court finds that although the plaintiff failed to prove any of her claims by a preponderance of the evidence, the record does reveal that the plaintiff is an intelligent, industrious, and conscientious woman who is a capable and dedicated professional. Her claim was not frivolous, unreasonable, or groundless. She represented herself well before this Court. The evidence was clear and convincing that the non-renewal of plaintiff's terminal contract and Villanova's determination not to evaluate her for tenure were not in any way related to her professional competence.

Accordingly, judgment will be entered in favor of the defendant, Villanova University, and against the plaintiff, Karen Fitzpatrick. An appropriate order follows. This Memorandum is in lieu of findings of fact and conclusions of law pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

KAREN FITZPATRICK — CIVIL ACTION

v.

VILLANOVA UNIVERSITY — NO. 81-4428

ORDER

AND NOW, this 17th day of November, 1983, for the reasons set forth in the accompanying Memorandum, IT IS HEREBY ORDERED that judgment is ENTERED in favor of the defendant, Villanova University, and against the plaintiff, Karen Fitzpatrick.

RAYMOND J. BRODERICK, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1190

FITZPATRICK, KAREN

vs.

VILLANOVA UNIVERSITY

Dr. Karen Fitzpatrick, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 4, 1985.

Circuit Judge

Dated: December 10, 1984

APPENDIX E

## CERTIFICATE OF SERVICE

Dr. Karen Fitzpatrick, hereby certifies that three copies of Petition for Writ of Certiorari, were served by certified mail upon Jami Wintz McKeon and Raymond T. Cullen at 2000 One Logan Square, Philadelphia, Pennsylvania 19103 on January 3, 1985.

Dr. Karen Fitzpatrick

Dr. Karen Fitzpatrick